No. 11665

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CARLOS ROMERO OCHOA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

Appellant was indicted under Sections 253, 254 and 454 of Title 18 of the United States Codes. The District Court had jurisdiction of the cause under Section 24 of the Judicial Code (28 U. S. C. 41(2)). The offenses charged were committed in Riverside County, State of California [R. T. 2-15].[1] Judgment was entered on May 19, 1947 [R. T. 13]. A pauper affidavit and order was filed May 20, 1947 [R. T. 20]. Notice of appeal was filed May 22, 1947 [R. T. 22]. This Court has jurisdiction under Section 128 of the Judicial Code (28 U. S. C. 225).

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[1]The references preceded by the symbol "R. T." are to the typewritten transcript of record on appeal; those preceded by the symbol "A. B." are to Appellant's Brief on Appeal; those preceded by the symbol "R." are to the typewritten Reporter's Transcript of Proceedings.

Statutes Involved.

A. Section 253 of Title 18, United States Code, provides:

> "Killing federal officer; penalty
>
> Whoever shall kill, as defined in sections 452 and 453 of this title, . . . any immigrant inspector or any immigration patrol inspector . . . while engaged in the performance of his official duties, or on account of the performance of his official duties, shall be punished as provided under section 454 of this title."

B. Section 254, of Title 18, United States Code, provides:

> "Resisting, interfering with or assaulting federal officer; penalty
>
> Whoever shall forcibly resist, oppose, impede, intimidate, or interfere with any person designated in section 253 of this title while engaged in the performance of his official duties, or shall assault him on account of the performance of his official duties, shall be fined not more than $5,000, or imprisoned not more than three years, or both; and whoever, in the commission of any of the acts described in this section, shall use a deadly or dangerous weapon shall be fined not more than $10,000, or imprisoned not more than ten years, or both."

C. Section 452, Title 18, U. S. C., provides as follows:

> "Murder; first degree; second degree. Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate,

malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree."

D. Section 453, Title 18, U. S. C., provides as follows:

"Manslaughter; voluntary; involuntary. Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."

E. Section 454 of Title 18, United States Code, provides:

"Punishment; murder; manslaughter. Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree shall be imprisoned not less than ten years and may be imprisoned for life. Every person guilty of voluntary manslaughter shall be imprisoned not more than ten years. Every person guilty of involuntary manslaughter shall be imprisoned not more than three years, or fined not exceeding $1,000, or both."

F. Section 567, Title 18, U. S. C., provides as follows:

"Verdicts; qualified verdicts. In all cases where the accused is found guilty of the crime of murder

in the first degree, or rape, the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life."

Statement of the Case.

An indictment in two counts was returned by the Grand Jury, in the February, 1947, Term and filed on April 9, 1947 in the United States District Court for the Southern District of California, Central Division, charging appellant with violation of Sections 253, 254 and 454 of Title 18 of the United States Code [R. T. 2].

Count One charged that appellant with premeditation and by means of shooting, murdered an Immigration Patrol Inspector, engaged in the performance of his official duties [R. T. 2]. Count Two charged that appellant assaulted with a deadly weapon, namely, a .32 caliber automatic pistol, an Immigration Patrol Inspector, engaged in the performance of his official duties [R. T. 3].

Appellant pleaded not guilty to each count of the indictment [R. T. 5] and the case was tried before the Court and a jury on April 30, 1947, and May 1, 2, 6, 7 and 8, 1947 [R. T. 15].

The jury found the appellant guilty of first degree murder on Count One, and guilty of assault of a Federal officer with a deadly weapon on Count Two.

Thereafter, following appellant's motion in arrest of judgment [R. T. 13] the District Court sentenced appellant to suffer the death penalty on Count One, and sentenced appellant to 10 years imprisonment on Count Two [R. T. 13, 18].

Statement of Facts.

On the evening of March 11, 1947 John Louis Fouquette and Anthony Leo Oneto were Immigration Patrol Inspectors of the Immigration and Naturalization Service, U. S. Department of Justice, stationed at Indio, California [R. 122, 135]. They were assigned to duty on Highway 99, south of Indio [R. 123-7] to apprehend aliens unlawfully in the United States, and persons smuggling aliens into the United States [R. 123]. They went out on duty together at approximately 4 P. M., in a Government patrol car [R. 135]. Both wore uniforms [R. 136].

At approximately 7:15 P. M. they set up a check station at a point known as Travertine Rock on Highway 99, approximately 24 miles south of Indio [R. 136]. A check station is a watch point where the officers set up a stop sign and red light to stop oncoming traffic and check it [R. 136].

The evening was quite dark [R. 137]. At about 8:15 P. M. a Chevrolet coupe driven by appellant was stopped by the inspectors at the check station [R. 138]. They found four alien Mexicans [See R. 179, 186] in the Chevrolet and placed them in the rear seat of the Government car [R. 138].

The officers instructed appellant to drive his car ahead of the government car [R. 375]. With appellant's car immediately preceding the government's automobile [R. 139] they drove up the highway toward Indio [R. 139]. After a stop at Oasis station [R. 140], they proceeded towards Indio in the same manner as before [R. 140]. Approximately four miles south of Indio [R. 141] the officers noticed that appellant's car appeared to be driving with difficulties [R. 141] which lasted for approximately two

miles [R. 141]. The appellant had decided to stop and get away. He knew the ignition switch on his car was bad, so he had turned the switch on and off several times trying to find the place where there was a bad contact. He could not find it so he decided to stop anyway [R. 375]. On the seat beside him [R. 34] appellant had a .32 caliber gun, which he had purchased three weeks before in El Centro [R. 374]. He put the gun in his left pants pocket. Appellant pulled the Chevrolet over onto the shoulder of the highway [R. 142], turned the switch off [R. 376] and stopped abruptly [R. 141]. Inspector Fouquette was driving the government car and pulled onto the shoulder of the road directly behind and within a foot or two of appellant's car [R. 141]. Inspector Oneto was in the front seat to the right of Inspector Fouquette [R. 177]. The appellant immediately got out of his car on the driver's side and commenced walking back to the government car on the driver's side [R. 142]. When he reached a point even with the front fender of the government car, appellant stated that "his gasoline seemed to be plugged." Inspector Fouquette told him to get back to the car and that they would push it into Indio with the government car. Appellant repeated "on to Indio" and continued towards the government's car on the left side, to the front seat of the government's car. Appellant pointed the .32 caliber automatic pistol into the government's automobile and stated, "You fellows put your hands up" and then immediately commenced firing into the car [R. 143, 171].

Inspector Fouquette received a through and through flesh wound in his right shoulder [R. 149]. Inspector Oneto was shot between the eyes [R. 194, 205]; suffered one bullet wound over the left cheek, had two holes

in the frontal scalp, and a crease mark across the left shoulder [R. 96]. The bullet that entered between Inspector Oneto's eyes proceeded directly through the base of his brain and lodged in the back of his neck. Another bullet was also recovered from his brain [R. 96].

Inspector Fouquette opened the door of the car [R. 144] and glimpsed the appellant running around the back of the government car and getting away amongst the trees [R. 144, 376]. Appellant walked several miles to his sister's house [R. 376].

Inspector Fouquette returned to the government car and found Inspector Oneto with his feet up, on the other side of the front seat [R. 145]. He felt of Inspector Oneto's pulse and Inspector Oneto was dead at that time [R. 145]. The cause of Inspector Oneto's death was determined to be maceration of the brain due to bullet wounds [R. 96-97].

The reason appellant shot the officers was because he wanted to get away [R. 376]. On May 18, 1944, the appellant was convicted on two counts in the Federal District Court for the Southern District of California, Southern Division, for violation of U. S. C. Title 8, Sec. 144; and U. S. C. Title 18, Sec. 88. The imposition of sentence on each count was suspended for three years, on the probation condition, amongst others, that appellant would not violate any laws of the United States, State, County or City in which he resides [R. 386].

The facts of the case were undisputed. It was admitted by defense counsel, in his opening statement to the jury, that appellant had killed Inspector Oneto. Appellant's primary defense was that he was insane (See A. B. 3).

ARGUMENT.

I.

The Manner in Which the Trial Judge Examined the Expert Witness Dr. Thomas H. Leonard, Was Proper and Did Not Constitute Prejudicial Error.

Questions by the trial court are given an interpretation and meaning by appellant (A. B. 7 ff.) which they did not have at the time they actually occurred. Such questions must be examined in the light of the circumstances at the time they were made.

In *United States v. Warren,* 120 F. (2d) (C. C. A. 2, 1941), the Court said (p. 212):

> "Indeed the disposition of the courts to reverse judgments because of minor excesses in the exercise of the Judges authority at the trial has much abated; separate passages cut from their context and from the trial as a whole, often have an apparent importance which in fact they do not deserve."

We discuss below appellant's assertion that the manner in which the trial judge examined the witness, Dr. Leonard, constituted prejudicial error (A. B. 3), but it should be noted at the outset that his complaint is essentially based on the fact that the trial judge participated in bringing out the full facts on the question of insanity for the consideration of the jury. Appellant has plainly aligned himself with those litigants who "become over critical of a trial judge after conviction and on appeal seek to try him instead of the merits or demerits of their cause." (*United States v. Breen,* 96 F. (2d) 782, 784 (C. C. A. 2, 1938).)

The witness, Dr. Thomas H. Leonard, was called by the trial court as its expert witness, as a part of the ap-

pellant's case. Appellant's counsel, upon his request, was permitted by the trial court to ask the witness leading questions [R. 296, l. 1.]

The trial judge, under the federal system, is not only permitted, but it is his duty to participate directly in the trial and to facilitate its orderly progress. (*Hargrove v. United States*, 25 F. (2d) 258, at 259 (C. C. A. 8, 1928).) It is his duty to shorten unimportant preliminaries. The purpose of the trial is to arrive at the truth. (See *Lewis v. United States,* 11 F. (2d) 745, 747 (C. C. A. 6, 1926).) In performing his duties, it may become necessary to shorten the examination of witnesses by counsel, and there is no reason why the trial judge should not ask a witness questions when it becomes essential to the development of the case.

In this regard, the court in *Kirk v. United States,* 280 Fed. 506 (C. C. A. 8, 1922), at page 507, said:

> "The next specification is that the trial judge took over the examination of witnesses for the government and by interference prevented the cross-examination of witnesses. The record discloses that he interrogated the witnesses to an unusual extent. But his authority in this respect when exercised in a non-prejudicial manner, and subject to the same exceptions as if conducted by counsel cannot be questioned. 38 Cyc. 1316; 26 R. C. L. 1925, 1926. We have been unable to discover any resulting prejudice to the defendants from the inquiries made in this case. Cases are relied upon wherein the fair limitations of inquiry were exceeded, but we find them either inapplicable or not authoritative in the federal courts."

Questions by the trial court which are intended to clarify the testimony of the witnesses were proper. Thus, in *Kirkpatrick v. United States,* 299 Fed. 226 (C. C. A. 9, 1924), the Court, at page 226, said:

> "Counsel for Kirkpatrick say that the trial was unfair because of the attitude of 'the Court,' and particularize by citing several instances where a witness, having answered a question put by counsel, was asked by the judge whether he meant a definite matter as stated by the judge. For example, a witness in describing his movements said that he and defendant, Kirkpatrick, unloaded five cases of whiskey; the Court interposed by asking, 'You mean sacks?' No objection was made on the trial by defendant's counsel, no exception was recorded and apparently during the trial no attention was paid to the matter. Plainly such interrogatories by the Court were intended not to alter but merely to clarify the testimony. There is nothing from which it is to be inferred that the Court, by asking the question, displayed unfairness or prejudice."

It is proper for the trial court to confine the inquiry to relevant matters. See *Callahan v. U. S.,* 35 F. (2d) 633, 634 (C. C. A. 10, 1929).)

In reviewing the actions of the trial judge we refer to his instructions to the jury, which specifically charge:

> "During the course of the trial I have asked questions of certain witnesses. *My object was to bring out in greater detail facts not then fully covered in the testimony.* You are *not to assume* that I hold any *opinion* as to the matters to which the questions related. Remember at all times that you, as jurors, are at liberty to *disregard all comments* of the court in arriving at your own findings as to facts." [R. 458, l. 17]. (Italics ours for purpose of emphasis.)

As a psychiatrist, the witness, in attempting to reconcile the therapeutic standards of his own art with the moral judgments of the criminal law, became confused. (See *Holloway v. United States,* 148 F. (2d) 665, at 666 (C. C. A., D. C. 1945).)

The witness [R. 330, l. 20] stated:

> "I know your honor, that your legal minds dwell a great deal upon the difference between right and wrong; but from a strictly psychiatric point of view, that is the reactions of the mind, when the individual is about to commit that crime, that capital crime, he is not reasoning at all."

Upon examination by appellant's counsel the witness stated that appellant "has a deficiency mentality" [R. 312]; that he has an intelligence quotient of about 10½ years [R. 313]; that he "needs supervision on account of his dual personal makeup" [R. 14]; that "when provoked he exercises little or no reason and may become dangerous to others and himself; knows right from wrong" [R. 314]; that he has a split personality [R. 314]; that he had difficulty determining whether appellant would know right from wrong when provoked, or he is in a temper tantrum [R. 314-315]; that his dominant reactions were those of a mental defect [R. 316]; that on March 11th when appellant used the gun he was exercising one of his temper tantrums [R. 316].

Upon cross-examination by counsel for the government, the witness stated that appellant knew right from wrong on March 11, 1947 [R. 320]; that a person with a split personality of appellant's type, "at the time he is provoked is insane." By insane he meant "he becomes unable to adjust himself agreeably to his environment and may be-

come dangerous" [R. 320]; that an individual in a wild rage, extremely angered state of mind, "at that particular time he is not responsible for his act, that he is insane" [R. 323]; that it is difficult to answer "whether an otherwise normal person under extreme stress, when he is in a rage, is sane or insane" because this is answering a question he did "not think has been answered by any of his co-workers satisfactorily. When a person is provoked is the time they usually commit crime" [R. 324]. That during a tantrum appellant would be in a state of mind to plan and devise a scheme. "His plan might be illegal and conflict with the general trend and opinions of the people in the community in which he lived, but they were plans for him and he would probably proceed on plans of his own at such time." He would not "be able to proceed with a rational plan to accomplish an otherwise normal person would employ if he had that object in mind." At such time "he is conscious of what he is doing but lacks that reasoning the normal individual usually exercises . . . he will throw everything to the winds and go through with his one idea, without reason. It is reason that differentiates this man from the normal individual" [R. 325]; that "any person who commits crime, momentarily or at the moment is not exercising reasoning" [R. 327].

This witness was called by the trial court as an expert witness. The questions the Court asked were proper and necessary. A careful examination of the questions asked by the trial court [R. 327 ff] will convincingly establish that they were intended only to bring out the full facts as to this expert witness' meaning of insanity for the consideration of the jury without prejudice to the defendant, except in so far as a full presentation of the facts

might have that incidental effect. This is fully borne out by instructions of the trial court to the jury on the question of insanity [R. 456-457-458].

We submit that examination of the record in each instance will disclose that no reversible error was committed.[2]

II.

The Argument of Counsel for the Government to the Jury Was Not Prejudicial to the Appellant.

Appellant in his opening brief (A. B. 36) raises, for the first time the objection that the argument of counsel for the government to the jury was improper and prejudicial to appellant.

No objection was made during or immediately following the argument of the prosecutor referred to, nor was the Court requested to interrupt it, or caution the jury against its force; and no exceptions were taken.

It was the duty of appellant at once to call the attention of the Court to the objectionable remarks, and request its interposition and, in case of refusal, to note an exception. (See *Crumpton v. United States,* 138 U. S. 361 (1891); *Carlisle v. United States,* 66 F. (2d) 666 (C. C. A. 5, 1933); *DeBonis v. United States,* 54 F. (2d) 3, (C. C. A. 6, 1931); *McIntosh v. United States,* 1 F. (2d) 427 (C. C. A. 7, 1924).)

Only in the most exceptional cases can an appellant remain silent and interpose no objection and after ver-

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[2]No useful purpose would be served in reproducing in detail in this brief those portions of the record involved. We believe that the Court will obtain a better perspective of what transpired by direct reference to the transcript.

dict has been returned object that the prosecution made improper remarks to the jury. (See *Bratcher v. United States,* 149 F. (2d) 742 (C. C. A. 4, 1945); *United States v. Socony-Vacuum Oil Co.,* 310 U. S. 150, 339 (1940).)

In *Dale v. United States,* 66 F. (2d) 666 (C. C. A. 5, 1933), the Court, at page 667, stated:

> "Omission to complain in time persuasively suggests that even counsel, deeply interested in the case, were not then so impressed with the significance of the misstatements as to call the Court's attention thereto. Generally it may be safely said that, if such misstatements did not at the time sufficiently impress counsel as being harmful, it is not likely that they materially affected the jury."

However, considering the question raised here by appellant, it is well settled that the remarks of a prosecutor do not constitute a basis for reversal unless they result in prejudice to the accused. (See *Bratcher v. United States, supra,* at page 746.)

The present case is clear and strong. The evidence relating to the killing of the Immigration Officer is overwhelming and uncontradicted, and unquestionably established that appellant shot and killed him. Appellant concedes that the "facts of the case were undisputed and that the defense counsel, in his opening statement to the jury, admitted that the Immigration Officer was killed and that appellant had killed him" (A. B. 3).

The statements to which appellant now objects do not constitute prejudicial error. It is difficult to imagine that the minds of the jurors in a case such as the present one, would be influenced by such statements during the closing argument to the extent that they would not appraise the

evidence objectively and dispassionately. (See *United States v. Socony, supra,* at page 239.)

Appellant objects that several of the prosecutor's remarks were outside the evidence. As stated in *Dunlop v. United States,* 165 U. S. 486, 498, "if every remark made by counsel outside the testimony were grounds for a reversal, comparatively few verdicts would stand."

A reading of the record will convince that the statements of the counsel for the government were minor aberrations, if at all, in a long trial and not cumulative evidence of a proceeding dominated by passion and prejudice.

Counsel for the Government had a right to make any argument based upon evidence proven in the case, or which may be reasonably inferred therefrom, and to *make reply to that made by opposing counsel, and, in doing so, statements may be made which otherwise would be improper.*

See:

Malone v. U. S., 94 F. (2d) 281, 288 (C. C. A. 7, 1938);
Rice v. U. S., 35 F. (2d) 689 (C. C. A. 2, 1929);
Baker v. U. S., 115 F. (2d) 533, 544 (C. C. A. 8, 1940);
Sheridan v. U. S., 118 F. (2d) 828, 856 (C. C. A. 9, 1941).

To set forth a further analysis of the alleged improper statements by counsel for the government during the argument to the jury would unduly prolong this brief. We submit there is nothing in the argument which would constitute reversible error. Though vigorous and forcible it is as fair to the appellant as might be reasonably expected under the circumstances. A reversal would not promote the ends of justice.

III.

The Jury Was Correctly Informed of Its Prerogative to Recommend Against Capital Punishment.

The Supreme Court, in *Winston v. United States,* 172 U. S. 303 (1899) (cited in A. B. 44), states the rule with regard to qualified verdicts of guilty in cases of murder, at page 313:

> "The right to qualify a verdict of guilty, by adding the words 'without capital punishment,' is thus conferred upon the jury in all cases of murder. The Act does not itself prescribe, *nor authorize the Court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and consciences of the jury.* The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the Court, or the jury, is of the opinion that there are palliating or mitigating circumstances. But it *extends to every case in which, upon a review of the whole evidence the jury is of the opinion that it would not be just or wise to impose capital punishment."* (Italics ours for the purposes of emphasis.)

There is nothing in this opinion affirmatively requiring a charge by the trial court to the jury informing it that the right not to impose capital punishment is not limited to cases where there are palliating or mitigating circumstances. Rather, it points out that the Court cannot make *any* rule defining or circumscribing the exercise of the right of the jury to qualify a verdict. We should like to point out, also (with reference to A. B. 45) that the above Court's opinion specified that the authority of the jury to decide that accused shall not be punished capi-

tally, extends to every case in which, *upon a review of the whole evidence,* the jury is of the opinion it would not be just or wise to impose capital punishment.

The actions of the trial court and the instruction it gave to the jury regarding their right to qualify a verdict of guilty, specifically left to the jury the entire discretionary power vested in it by Congress. The Court charged the jury as follows [R. 460]:

> "Ordinarily, in a criminal case, I would not say anything to the jury with respect to the punishment, if any, to follow in event of conviction of the accused.
>
> ". . . Section 567 of Title 18 of the United States Code provides that:
>
> 'In all cases where the accused is found guilty of the crime of murder in the first degree . . . the jury may qualify their verdict by adding thereto (the words) "without capital punishment"; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life.'
>
> "Accordingly, if you find defendant, CARLOS ROMERO OCHOA, guilty of murder in the first degree, as charged in the First Count of the Indictment, the law gives you the *unrestricted right to decide whether or not he should suffer the death penalty. There are no rules to guide you in this decision,* and you should *not interpret any instruction or any comment or other occurrence* during the trial, or during the selection of the jury, as indicating how you should reach a particular decision, regarding the death penalty, *since those are matters which are left entirely*

to the discretion of the jury." (Italics ours for purpose of emphasis.)

See also R. 461 and 465.

We respectfully submit, that this charge makes no reference or limitation indicating that mitigating or palliating circumstances must be present for a qualified verdict. It leaves the entire matter wholly to the judgment, conscience and discretion of the jury, alone, as required under the law.

IV.

The Indictment Which Is Based Upon the Form Prescribed by the United States Supreme Court, Is Adequate.

The Rules of Criminal Procedure for the District Courts of the United States covering proceedings in criminal cases prior to and including the verdict, finding of guilty or not guilty by the Court, or plea of guilty, were prescribed by the Supreme Court, pursuant to the Act of June 29, 1940, c. 445, 554 Stat. 668.

As provided in that Act, these rules were reported to Congress at the beginning of the regular session of Congress commencing on the third day of January, 1945, by the Attorney General of the Department of Justice. They became effective March 21, 1946. (Title 18, U. S. C., following Sec. 687.)

The Supreme Court in the Appendix of Forms to the Federal Rules of Criminal Procedure (18 U. S. C., fol-

lowing 687) prescribed the form of indictment for murder in the first degree of a federal officer.[3]

Title 18, U. S. C., Sec. 687, in respect to said rules, provides, that upon the close of such session of Congress and thereafter, "All laws in conflict therewith shall be of no further force or effect."

The rules of practice and procedure in criminal cases adopted by the Supreme Court have had the force of federal statutes.

See:

Galagher v. U. S., 82 F. (2d) 721 (C. C. A., 1936);

Cook v. Swope, 28 F. Supp. 492 (D. C. Wash., 1939);

United States v. Infusino, 131 F. (2d) 617 (C. C. A., 1942).

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[3]Thus "Form 1. Indictment for Murder in the First Degree of Federal Officer," provides:

In the District Court of the United States for the.....
District of.....Division

United States of America) No.
v.) (18 U. S. C. A. §§253, 452)
John Doe)

The grand jury charges:

On or about the.....day of....., 19....., in the.....District of....., John Doe with premeditation and by means of shooting murdered John Roe, who was then an officer of the Federal Bureau of Investigation of the Department of Justice engaged in the performance of his official duties.

A True Bill.

.....
Foreman.

.....
United States Attorney

The murder count of the present indictment relating to the appellant [R. T. 2] in this case, specifically follows the language of the Supreme Court in "Form 1. Indictment for Murder in the First Degree of Federal Officer." We append the indictment, Count One, in the footnote.[4]

The Title of the Supreme Court's form and the present indictment specifically state that the indictment is for *murder in the first degree of a federal officer.* They specifically provide that appellant (a) with *premeditation and (b) by means of shooting (c) murdered a (d) federal officer (e) engaged in his official duties.* This form includes a statement of all of the necessary allegations of the offense.

A premeditated killing is murder in the first degree, and it is wilful, deliberate and expressly malicious. In

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[4] In the District Court of the United States
In and for the Southern District of California
Central Division

February, 1947, Term

United States of America, Plaintiff, v. Carlos Romero Ochoa, *et al.,* Defendants. No. 19269.

INDICTMENT

(U. S. C., Title 18, Secs. 253, 254, 454, and 551—murder and assault of federal officers, accessory after the fact)

The grand jury charges:

COUNT ONE
(U. S. C., Title 18, Sections 253, 454, 551)

On or about March 11, 1947, in Riverside County, California, within the Central Division of the Southern District of California, defendant Carlos Romero Ochoa, with premeditation and by means of shooting, murdered Anthony Leo Oneto, who was then an officer of the Immigration and Naturalization Service of the United States Department of Justice, to-wit: an immigration patrol inspector, engaged in the performance of his official duties.

this regard, in *State v. Clifford,* 17 N. W. 304, 307, 58 Wash. 477 (1883), at page 487 it is noted:

> "A premeditated killing is murder in the first degree, and can be nothing else, because it implies the lying in wait and malice aforethought, and settled design. It is willful, deliberate and expressly malicious, and, of course, these elements exclude all extenuating circumstances or conditions and the courts can make none."

See:

> *King v. State,* 20 S. W. 169, 91 Tenn. (Pickle) 617, 646 (1892).

Compare the language in *Borden v. United States,* 15 F. (2d) 17 (C. A. D. C., 1945), where the Court, at page 18, said:

> "The perpetration of a robbery during which a homicide is committed, legally takes the place of *that premeditation to kill which is necessary for murder* in the first degree." Citing *Sloan v. State,* 70 Fla. 163, 169, So. 891. (Italics ours for purpose of emphasis.)

The terms "premeditation" or "premeditated design" have been variously used as synonymous with or including the following terms: "willful," see *Aubrey v. State,* 62 Ark. 368, 35 S. W. 792 (1896); "deliberate," see *White v. State,* 236 Ala. 124, 181 So. 109 (1938); "deliberate design, malice aforethought," see *Hawthorne v. State,* 58 Miss. 778, 783 (1881); "malice aforethought," *State v. Seifert,* 118 Pac. 746, 748, 65 Wash. 596 (1911).

The general attitude of the federal courts with regard to criminal pleadings is stated in *Hopper v. United States,* 142 F. (2d) 181 (C. C. A. 9, 1944), at page 184:

> "At least since Hagner v. United States, 285 U. S. 427, 52 S. Ct. 417, 76 L. Ed. 861, the federal courts have determined the sufficiency of criminal pleadings on the basis of practical as opposed to technical considerations."

Under the present Criminal Rules it is only necessary that "The Indictment or the Information shall be plain, concise and a definite written statement of the essential facts constituting the offense charged." Rule 7(c). The spirit and intent of the Criminal Rules is indicated by the Appendix of Forms which have been given official illustrative status by Rule 58. The previous precision and detail that was held necessary to charge an offense are no longer necessary. See *Lowery v. United States,* 161 F. (2d) 30, 35 (C. C. A. 8, 1947). Cert. denied. See 67 S. Ct. 1737. See *United States v. Agnew,* 6 F. R. D. 566 (D. C. E. D. Penn., 1947).

The record clearly shows appellant was not prejudiced in any possible manner by the pleadings. He was clearly apprised by the Indictment of what he must be prepared to meet, and the record indicates that he was so fully prepared.

We necessarily conclude that the Supreme Court, in providing its *own* "Form 1, Indictment for Murder in First Degree of Federal Officer," was fully cognizant of the law and did purposely and intentionally set forth what it considered to be "a plain, concise and definite written statement of the essential facts constituting the offense" of murder in the first degree of a federal officer.

Conclusion.

This is a case in which the evidence is undisputed that appellant shot and killed a federal officer. There was no reversible error committed by the trial court in the conduct of the trial, by counsel for the Government in its argument to the jury, or in the Court's instructions given to the jury. The indictment was adequate and the appellant had a fair and full trial. There is no reason for setting aside the verdict in the lower court's judgment. The judgment should be affirmed.

Respectfully submitted,

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